PP

v.

TAN SRI ERIC CHIA ENG HOCK

HIGH COURT MALAYA, KUALA LUMPUR
ABDULL HAMID EMBONG J
[CRIMINAL REVISION NO: 43-11-2005]
6 MAY 2005

CRIMINAL PROCEDURE: *Revision - Power of revision - Evidence recorded by Hong Kong Magistrate under provisions of Mutual Assistance in Criminal Matters Act 2002 (MACMA) - Sessions Court ruled Hong Kong evidence inadmissible - Whether Sessions Court's order open to revision by High Court - Whether law was misconceived resulting in miscarriage of justice - Whether High Court obliged to act under s. 323 of the Criminal Procedure Code - Whether s. 33 of the Evidence Act 1950 applicable - Mutual Assistance in Criminal Matters Act 2002, ss. 8(1), (3), (4)*

The accused is facing a charge under s. 409 of the Penal Code and the trial is currently ongoing before the Sessions Court Kuala Lumpur. The prosecution had sought to adduce certain evidence recorded earlier by a Magistrate in Hong Kong (the Hong Kong evidence) pursuant to the Attorney General of Malaysia's request under the provisions of the Mutual Assistance in Criminal Matters Act 2002 (MACMA). The defence made an objection to it and the Sessions Court ruled the Hong Kong evidence inadmissible. Hence, the learned deputy public prosecutor wrote to the High Court requesting for a revision of the said order. The issues that arose were (1) whether this was a fit and proper matter for this Court to exercise its revisionary power and (2) the issue of admissibility of the Hong Kong evidence.

Held (allowing revision on Sessions Court's ruling):

[1] The issue at hand is certainly open to a revision by this court. To disallow the Hong Kong evidence would hamper the prosecution from putting across its full and best evidence for the trial court's consideration. This court should not be barred from reviewing the order of the Sessions Court. If a situation arose where the subordinate court has misconceived the law resulting in a miscarriage of justice, then this court is obliged to act under s. 323 of the Criminal Procedure Code. (p 358 f-g)

[2] The proceeding before the Magistrate in Hong Kong was not a previous judicial proceeding envisaged under s. 33 of the Evidence Act 1950. The consideration for relevancy of evidence under s. 33 does not govern this aspect of the evidence under s. 8(1) of the MACMA. The latter section allows off-shore evidence taking upon the subjective satisfaction that such evidence, as in the Hong Kong evidence here, would be relevant in criminal proceedings within Malaysia, such as the ongoing trial now of the accused person. It was not required to pass the test and qualifications laid down in s. 33 of the Evidence Act 1950. (p 360 d-e)

[3] MACMA is a specific piece of legislation to facilitate mutual assistance in criminal matters. It is extra territorial in scope and being a law that transcends national boundary, it has to be read as special in its effect. Public policy demands that it be given a wider latitude and not be shackled by the dictates of technicalities found under the Evidence Act 1950, notwithstanding its mention in s. 8(3). The reception of evidence recorded pursuant to s. 8(1) of MACMA should not therefore be hampered by the requirements of the Evidence act 1950. This special law should be allowed to operate to its maximum efficacy. To subject its operation to the technical requirements as found under s. 33 of the Evidence Act 1950 would render Parliament's intention of a speedy and convenient method of evidence taken overseas as nugatory. (p 360 f-g)

[4] The court allowed for a revision on the Sessions Court's ruling on the said issue and made an order that the Hong Kong evidence be made admissible and be marked as an exhibit for the prosecution. The question of veracity and weight of the Hong Kong evidence should be determined by the trial judge at a later stage of the proceedings, as allowed under the guidelines provided by s. 8(4) of MACMA. (p 362 b)

Case(s) referred to:

AG of Malaysia v. Gapari Kitingan [1990] 2 CLJ 707; [1990] 1 CLJ (Rep) 617 HC ***(refd)***

Goodwin v. Philips (7 CLR 1, 14) ***(refd)***

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 31, 36

Criminal Procedure Code, ss. 323, 326

Evidence Act 1950, s. 33

Mutual Assistance in Criminal Matters Act 2002, s. 8(1), (3), (4)

Penal Code, s. 409

Rules of the High Court 1980, O. 39 r. 2

Evidence Ordinance [Hong Kong], s. 77F

Other source(s) referred to:
NS Bindra's Interpretation of Statutes 1997, p 510

For the prosecution - Mohd Yusof Zainal Abiden (Tun Majid Tun Hamzah & Nordin Hassan with him)
For the respondent - Muhammad Shafee Abdullah (Amy Chong Boon Chin with him); M/s Shafee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdull Hamid Embong J:
The accused person is facing a charge under s. 409 Penal Code and the trial is currently ongoing before the Sessions Court at Kuala Lumpur. The prosecution had sought to adduce certain evidence recorded earlier by a magistrate in Hong Kong (the Hong Kong evidence) pursuant to the Attorney General of Malaysia's request under the provisions of the Mutual Assistance in Criminal Matters Act 2002 (MACMA) but this was objected to by the defence. The learned Sessions Court Judge after hearing arguments on the admissibility of that Hong Kong evidence ruled it to be inadmissible. The learned deputy public prosecutor wrote in to this court on 26 April 2005, requesting for a revision of that order by the Sessions Court Judge. On 27 April 2005 I invited learned counsel for the accused and the learned deputy to address this court on the issue of admissibility of that Hong Kong evidence.

Whether This Court Can Exercise Its Powers Of Revision
Learned counsel for the accused first raised a preliminary point on whether this is a fit and proper matter for this court to exercise its revisionary power. He contended that the power of revision is confined to those findings or orders made by a subordinate court which are so obviously improper or manifestly illegal, that even on a cursory inspection of the records the High Court could make an order for a revision without hearing submissions. In this case, learned counsel argued, the issue at hand was lengthily argued in the Sessions Court and the order to disallow the Hong Kong evidence cannot be said to be a glaring error, now subjected to this court's revisionary power. It was also submitted that that order could be appealed against after completion of the trial. This call for a revision was therefore a back door way of appealing.

Revisionary orders are opened to both issues of law and procedure as can be seen from its sources under s. 323 of the Criminal Procedure Code, and s. 31 of the Courts of Judicature Act 1964 which states respectively:

323. Powers to call for records of subordinate courts

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that Subordinate Court.

31. Revision of criminal proceedings of subordinate courts

The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

When some real or substantial injustice has occurred, the High Court is duty bound to intervene. This is a special power, the extent of which is unfettered and wide. It has been described as a paternal supervisory jurisdiction and may be invoked to correct any miscarriage of justice. (See *Liaw Kwai Wah & Anor. v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163). Miscarriage of justice is a wide but not an abstract concept. This court is to determine that there is fair play all round, in this instance to balance the interests of the Public Prosecutor who represents the public at large and the accused person. This was foremost in my mind when I called the matter up for a revision. The parties have no right of appearance or audience either personally or by counsel, before a judge exercising this discretionary power. (See s. 326 CPC and the equivalent s. 36 CJA 1964). However the judge may allow a person to be heard if the final order it makes is to that person's prejudice. With this in mind I had allowed both parties to address the court.

It is my view that the issue at hand is certainly open to a revision by this court. It is also my view that to disallow that Hong Kong evidence would be a miscarriage of justice in the sense that the prosecution would be hampered from putting across its full and best evidence for the trial court's consideration. As such I disagreed with the stand taken on this preliminary point that this court is barred from reviewing the order made by the learned Sessions Judge. I cannot see any legal basis for restraining this court's powers in exercising its revisionary power. As earlier stated, if there arises a situation where the subordinate court had misconceived the law and this resulted in a miscarriage of justice position as I found to arise here, then this court is obliged to act under s. 323 of the CPC.

Admissibility Of The Hong Kong Evidence

The Hong Kong evidence was taken in a proceeding by a magistrate in Hong Kong. It was recorded pursuant to the request of the Attorney General of Malaysia under s. 8(1) of MACMA. Under that section, once the Attorney General is satisfied that such evidence is relevant it may pursue to gather such evidence. The effect of this section is similar to evidence taken out of jurisdiction for use in a civil proceeding under O. 39 r. 2 of the Rules of the High Court 1980. In *AG Of Malaysia v. Gapari Kitingan* [1990] 2 CLJ 707; [1990] 1 CLJ (Rep) 617, Haidar J held that this O. 39 r. 2 procedure could even be made applicable to criminal proceedings with the necessary variations made to the request, even without the necessity of attempting to procure those overseas witnesses to attend and give evidence in the Malaysian court. Once that evidence is tendered before the trial court it may be admitted under s. 8(3) of the MACMA, which states:

> (3) Any evidence or thing, or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may, subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593], be admitted as evidence at any criminal proceedings to which the request relates.

Learned counsel for the accused fervently argued that the qualification 'subject to the Evidence Act' stated in that section must mean that it had to come within the regime of s. 33 Evidence Act 1950, which states that:

> **33. Relevancy of certain evidence for proving in subsequent proceeding the truth of facts therein stated**
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> Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable:
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> Provided that:
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> (a) the proceeding was between the same parties or their representatives in interest;
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> (b) the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) the questions in issue were substantially the same in the first as in the second proceeding.

In short, if the conditions stated in the proviso of s. 33 are met, evidence given in a previous judicial proceeding becomes relevant in a subsequent trial to prove that fact stated when that witness is, *inter alia*, dead or cannot be produced without considerable delay or expense.

Learned counsel argued that the situation in this case is actually reversed in that in obtaining the Hong Kong evidence much money and time was unnecessarily spent and that the prosecution had not even attempted at procuring those witnesses in Hong Kong to testify in Malaysia, which the Attorney General could request for under s. 9 of MACMA.

In my view, s. 33 of the Evidence Act has no application here. Firstly the proceeding before the magistrate in Hong Kong is not a previous judicial proceeding envisaged under that section. More importantly, the consideration for relevancy of evidence under s. 33 does not, in my view govern this aspect of the evidence under s. 8(1) of the MACMA. The latter section allows for off-shore evidence taking upon his subjective satisfaction that such evidence, as in the Hong Kong evidence here, would be relevant in any criminal proceedings within Malaysia, such as the ongoing trial now of the accused person. It is not required to pass the test and qualifications laid down in s. 33 of the Evidence Act.

MACMA, as the name suggests is a specific piece of legislation to facilitate mutual assistance in criminal matters. It is extra territorial in scope and being a law that transcends national boundary, it has to be read as special in its effect. In my view, public policy demands that it be given a wider latitude and not be shackled by the dictates of technicalities found under the Evidence Act 1950, notwithstanding its mention in s. 8(3). The reception of evidence recorded pursuant to s. 8(1) of MACMA should not therefore be hampered by the requirements of the Evidence Act. In my view, this special law should be allowed to operate to its maximum efficacy. To subject its operation to the technical requirements as found under s. 33 of the Evidence Act would render Parliament's intention of a speedy and convenient method of evidence taken overseas as nugatory

Even if assuming that s. 33 of the Evidence Act 1950 applies, I would still hold that MACMA, as a special legislation must be deemed to override that provision. In *Goodwin v. Phillips* (7, CLR 1, 14) it was said:

> The conflict between the two sections is one of the kinds to which Sir George Jessel, MR refers in *Taylor v. Oldham Corporation*. Where there is general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject-matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.

A commentary in *N.S. Bindra's Interpretation of Statutes* 1997, p. 510, makes the following observation, in an apparent conflict situation:

> **Conflict between general Acts and special statutes**
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> In case of statutes on same subject the rule of construction is to so interpret the enactments that they shall be if possible consistent. But if they cannot be fairly read in such a way as to give full meaning to each consistently with the other, then one must give way, and the one to give way will be the general provision. **In such a case the later special Act will be taken to have amended the earlier general Act in so far as the matters dealt with in the specific Act are concerned.** The Court, however, will assume that the Legislature, in enacting the sections as separate provisions of the same statute or groups of statutes intended full effect to be given to each. It is only when there becomes apparent an inconsistency which it is impossible to avoid by any reasonable interpretation of the words used, that a court will in general draw the conclusion that the Legislature intended the later special statute to repeal the earlier general statute. (emphasis added)

It is unfortunate that our Evidence Act 1950 was not consequently amended to cater for evidence taken under MACMA such as the one found under s. 77F of the Hong Kong Evidence Ordinance, Chapter 8, which states:

> **Admissibility in criminal proceedings of evidence obtained pursuant to letter of request:**
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> (1) Subject to this section and section 77G, any deposition, together with any document or thing exhibited or annexed thereto, which is received by the Registrar pursuant to a letter of request issued by him under section 77E in respect of any criminal proceedings, **shall on its production without further proof be admitted in those criminal proceedings as *prima facie* evidence of any fact stated** in the deposition and in the document (if any) exhibited or annexed thereto ... (emphasis added)

The learned deputy public prosecutor had submitted that the phrase "subject to the Evidence Act 1950" should be confined to those parts of the Evidence Act 1950 on the relevancy of facts, in particular ss. 6-16. This too could not be a correct interpretation because it would have been so stated in the law if it was meant to be that. It may also well be that that phase is in anticipation of an amendment to the Evidence Act 1950. Be that as it may, it is my view that MACMA should be read with a degree of liberty so that its objective is met.

For these reasons, I would allow for a revision on the learned Sessions Court Judge's ruling on this issue and make an order that:

(i) The Hong Kong evidence be made admissible and be marked as an exhibit for the prosecution.

(ii) The question of veracity and weight of that Hong Kong evidence be determined by the learned trial judge at a later stage of the proceedings (as is allowed under the guidelines provided by s. 8(4) of MACMA).